



Mr. William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CS Docket No. 02-52; FCC 02-77
Appropriate Regulatory Treatment for
Broadband Access to the Internet over Cable Facilities

The Digital Media Association ("DiMA") submits these Reply Comments in response to Comments of other parties filed in the above-referenced proceeding.

For the reasons set forth below, the Commission should ensure that broadband access to the Internet reflects what is perhaps the single greatest consumer expectation with regard to the Internet: unfettered consumer access to information and services of their own choosing. Only by maximizing consumer choice of technology platform, service provider, and access to information will our nation meet our broadband adoption goals, and realize all the associated benefits. Although the Commission's role with respect to promoting consumer choice will differ in various circumstances, promoting consumer choice must be the touchstone for Commission actions related to the Internet.

Statement of Interest. Founded in 1998, DiMA member companies create, package and distribute entertainment, news, educational and other content online, and manufacture devices that enhance the value of online and traditionally-distributed content. Employing innovative technologies and business models, its member companies provide consumers' legal access to comprehensive repertoires of information for entertainment, education, business and shopping needs and enhance the consumer experience and the content value by making it portable, accessible and manageable.¹

DiMA member companies therefore are acutely interested in promoting consumer adoption of broadband, digital personal networks, and the services that fill those pipes.

¹ Amazon.com, FullAudio, Listen.com, Microsoft, MusicMatch, RealNetworks, SONICblue, Thomson Multimedia, Verizon and Yahoo! are among the members of DiMA.



Robust and stable broadband service enables a higher-quality user experience, particularly for music and audiovisual content. Greater bandwidth facilitates the reliable

transmission of higher quality audio and video performances, and the rapid dissemination of media files, such that digital streaming and distribution of media will become a compelling business to the mass consumer market. Moreover, if consumers have unfettered access to their choice of Internet services and information, then our industry's winners will be determined not by broadband chokepoints, but rather by the essential competitive benchmarks that traditionally drive America's entrepreneurs to success – quality, price and service. The result will be widely available, affordable consumer broadband access, and a plethora of services to satisfy existing customers and attract even more.

Competition and Consumer Choice of Information, Applications and Network Appliances. Perhaps the most remarkable opportunity associated with the Internet is the widespread availability of information that the consumer can individually choose to access – or “pull” – when and where s/he wants, and then to use that information lawfully with a variety of devices and applications. This contrasts with every other major media, which “push” content selected by editors, programmers and sponsors, and deliver it to mass markets where and when the content provider decides.

If consumer choice of information, applications or devices is limited by broadband providers, the most compelling aspects of the Internet will be harmed, and competition in the greatest information marketplace heretofore seen will be severely diminished. This view is one shared by the High Tech Broadband Coalition (“HTBC”), which stated in its comments in this proceeding that, “Consumers should have unrestricted access to their choice of Internet content using the bandwidth capacity of their service plan.”² The HTBC added that “Cable modem customers should be allowed to run applications of their choice, as long as they do not harm the network and are within the bandwidth limits of their service plans.”³ DiMA also endorses that goal and urges the Commission to ensure that consumers have these protections. Absent these protections the anticompetitive impact will concern not only the ISPs that have been in the forefront of this debate, but also device manufacturers, applications developers, e-commerce retail firms and media services providers. Ultimately, the result will be less choice, higher prices and lower quality for consumers.

As a technological matter, broadband carriers may intentionally seek to impede consumer access to online information, products and services in many ways. Blocking or limiting access to certain types of information is often appropriate, e.g., parental filtering of adult-oriented content. Such blocking can, however, also be anticompetitive and harmful to consumer interests. Two recent examples:

² Comments of HTBC at 8.

³ Comments of HTBC at 8.

- TCI entered into well-publicized contracts that restricted consumer access to streaming media over their high-speed cable Internet service to less than 10 minutes' duration at a time -- apparently so as to avoid competition from streaming media with their cable television and music services.
- @Home, another cable Internet service, directed consumers upon sign-on exclusively to that service's home page, and precluded consumers from re-setting the home page to a directory or portal of their own preference.

Additionally, the HTBC Comments included many additional examples of limitations against consumers' apparently legitimate use of game services, networking services and equipment, and other devices or applications. Many of these restrictions did not arise out of concerns for network harm or other potentially legitimate issues, but rather seemed discretionary and focused on maintaining opportunities for future business models or proprietary business opportunities.

DiMA remains concerned that cable Internet service providers could intentionally interpose more subtle and sophisticated impediments to consumer access to unaffiliated or disfavored information providers. Short of blocking or filtering, "impeding access" can take many forms, such as shunting consumers only to favored information and media sources and preferred stores; intentionally diminishing connection speed or quality from unaffiliated sites while providing full bandwidth access and better quality signals for preferred affiliates; and, managing caching so as to provide faster access to preferred information sources.

DiMA appreciates that broadband carriers and ISPs have economic and legal interests in maintaining careful control over consumers' uses of their networks. We recognize that ISPs and carriers have a legitimate interest in managing their networks to maximize capacity, or for higher-value users. DiMA does not oppose generally the provision of favored status to websites that pay ISPs or carriers for advantageous positioning or carriage, so long as consumers still have reasonable access to all alternatives. In all contexts, DiMA agrees with the principle set forth by the HTBC that carriers and ISPs should at minimum be required to provide the consumer with the ability to access any lawful website or information provider of choice, without any diminution in quality or speed of access. It is plainly in the public interest -- particularly in unregulated services -- for the Commission to ensure that restrictions are narrowly tailored to serve legitimate interests, and do not interfere with consumer access to the free flow of information, commerce and media services over the Internet commons.

Technology Platform Competition. As information providers, DiMA member companies are reliant on and partner with cable, telephony and satellite companies that are building the broadband infrastructure. DiMA believes that competitive consumer choice between cable, DSL and satellite broadband services will promote higher quality service at lower prices, more marketing and promotion, and result in a higher degree of consumer adoption and satisfaction.

As the Commission, the Congress and the President have all defined our national interest in broadband adoption, DiMA encourages the Commission to ensure that no industry – telephony, cable or satellite – is hampered by historic unrelated regulatory burdens in their efforts to compete in the broadband infrastructure and services marketplace. DiMA companies know too well that unnecessary strictures can be imposed on new technologies and business models by laws designed for old technologies and business models. As the Commission continues to look forward toward future technologies and services, we also urge the Commission concurrently to reexamine whether prior regulations (well-intended and well-suited for their time) are limiting new opportunities.

Internet Access Services Competition. DiMA is concerned that in large segments of the country cable modem service is the only available broadband service, and that in a majority of those areas consumers have no choice regarding their Internet Service Provider (“ISP”). Heretofore DiMA has not participated in the debate regarding whether to require cable operators to provide ISPs with the right to access cable modem customers directly.

Today, however, DiMA notes that the issue of multiple ISP access is significant beyond the ISP community and beyond the issue of basic ISP service. DiMA companies generally offer value-added services at an additional price, and many of the DiMA companies’ services are significantly more attractive when accessed via broadband service. Thus, it is important to DiMA companies, and to all e-commerce and information services companies, that broadband access be competitively priced and consumer-oriented. Absent price competition and market orientation, broadband service will not reach its potential and neither will America attain its economic goals.

Accordingly, DiMA urges the Commission to vigilantly monitor the adoption of broadband in areas with intermodal competition and/or multiple ISP access, and to compare adoption rates – as well as prices and service quality – in those areas with areas that do not have intermodal competition or multiple ISP access. Often reliable data and public discussion results in consumer and voter education, and the combination can create quasi-competitive results where true competition does not exist. If the Commission finds that areas lacking intermodal competition or multiple ISP access are consistently behind other areas in consumer adoption or service quality, then it should consider what steps could be taken to enhance consumer value and the resulting service adoption.

Conclusion. If communications carries the means to human progress, the growth of the Internet is surely a giant step forward in the exchange of information, culture and commerce. Even in its incipient stages, the Internet has proven itself indispensable to modern life as information commons, open-air amphitheater, public governmental forum and shopping center. The fuel of this engine is the ability of new entrants to publish and attract a mass audience. For the Internet to reach its potential, then, the public must have the ability to obtain open and fair access to all of the published content.

Reliable and available broadband access therefore is integral to the growth of the Internet as a medium. We urge the Commission to continue its mission to promote widespread availability of broadband access, and to ensure that broadband providers facilitate fair access to all Internet services. The Commission therefore should seek to assure that such access providers do not abuse their ability to monitor the gateway to the Internet as a means to limit consumer access to information and services or, conversely, to impede commerce and information services from competing for access to the consumer. In all contexts the Commission should seek first to promote consumer choice – at every level of Internet service – as a legitimate economic and public interest. Any mistreatment of the consumer will inevitably harm the Internet's growth, broadband adoption and America's e-commerce economy.

Thank you very much for your consideration of DiMA's views. Please address any questions to the undersigned.

Respectfully submitted,

Jonathan Potter
Executive Director
jpotter@digmedia.org